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Special Considerations in Military Flying Club Litigation

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SPECIAL CONSIDERATIONS IN MILITARY FLYING CLUB LITIGATION

ROBERT J. GROSS*

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The author wishes to thank Paul Cormier, Senior Aviation Law Counsel, Aviation Law Branch, Tort Claims and Litigation Division, Air Force Legal Services Agency, for his assistance.

This paper represents the opinions of the author and does not necessarily represent the position of the United States Government or any of its agencies.

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I. INTRODUCTION

THE DEPARTMENT OF DEFENSE (DOD), through the U.S. Air Force, Army, Navy, and Marine Corps, operates numerous flying clubs¹ on a worldwide basis. Because of the large number of aircraft and personnel involved in military flying club activities, these clubs generate a considerable amount of aircraft accident litigation.

Like their civilian counterparts, the familiar flying clubs, flight schools and fixed-base operators, military flying clubs rent "low cost, light aircraft" (not to exceed 12,500 pounds) to club members for recreational purposes.² They also provide ground and flight training programs, which prepare students to meet the performance standards contained in the Federal Aviation Administration (FAA) Practical Test Standards, such as Private Pilot,

¹ Officially called "Aero Clubs" by the Air Force and Marine Corps, "Flying Activities" by the Army, and "Flying Clubs" by the Navy. Examples include the "Andrews AFB Aero Club," the "Fort Bragg Flying Activity," and the "Norfolk Navy Flying Club." Presently, the Air Force has 38 Aero Clubs, with a total of 400 aircraft and over 8,000 members; the Army has eight Flying Activities, with a total of 60 aircraft and approximately 750 members; the Navy has 30 Flying Clubs, with a total of 200 aircraft and over 3,500 members; and the Marine Corps has three Aero Clubs, with a total of 38 aircraft and over 900 members. The U.S. Coast Guard, a part of the Department of Transportation, has no flying clubs.

² See, e.g., Air Force Reg. [hereinafter AFR] 215-12, ¶ 1-2 (Sept. 5, 1988). For brevity, this article does not cite to all of the parallel regulations, orders, and instructions of the four military services unless there are significant differences. See *infra* note 21 for the full citation of these parallel publications.

Commercial Pilot, Airline Transport Pilot, Flight Instructor, Instrument and Multiengine.³

Unlike their civilian counterparts, military flying clubs are "nonappropriated fund instrumentalities" of the United States Government,⁴ and are not open to the public (membership is limited to persons with a recognized relationship to the DOD).⁵ Members must comply not only with Federal Aviation Regulations (FARs), but with military directives, regulations and instructions.⁶ In handling military flying club litigation, understanding these differences is essential.

This article addresses special considerations in military flying club litigation, including military flying club characteristics, the role of commercial insurers, and defenses. Because of the potential involvement of commercial liability insurers in military flying club cases,⁷ this article should be of interest to all aviation tort practitioners.

II. FLYING CLUB CHARACTERISTICS

The following provides a brief summary of military flying club characteristics, emphasizing the issues which frequently arise in military flying club cases:

A. PURPOSE

Military flying clubs are established as recreational activities to promote morale.⁸ They are designed to give eligible personnel an opportunity to enjoy safe, low-cost light aircraft operations and to develop skills in aeronau-

³ See, e.g., Navy Operating Instruction [hereinafter OPNAVINST] 1710.E, ¶ 418 (May 24, 1993). The extent of these training programs will vary from club to club, but all clubs provide at least a private pilot curriculum. See, e.g., Army Reg. [hereinafter AR] 215-2, ¶ 6-177 (Sept. 10, 1990) (stating that each Army Flying Activity "must provide access to a primary ground school for all students (mandatory) and a primary flight training program based on the curriculum outlined in FAR, part 141").

⁴ See *infra* note 16 and accompanying text.

⁵ See, e.g., AFR 215-12, ¶ 2-9 (Sept. 5, 1988).

⁶ *Id.* ¶ 4-1.

⁷ See *infra* notes 40-43 and accompanying text.

⁸ See, e.g., AFR 215-12, ¶ 1-2 (Sept. 5, 1988).

tics. The clubs promote awareness and appreciation of aviation requirements and techniques, while users enjoy a social activity.⁹

Although club aircraft may not be used for commercial purposes,¹⁰ they may be used for temporary duty (TDY) travel.¹¹ Air Force Commanders may also use Aero Club aircraft to support search and recovery operations and for other operational missions, such as parts pickup or maintenance support flights, when other Air Force aircraft are not available.¹² Aircraft used for such "operational missions" are performing an appropriated fund (as distinguished from a nonappropriated fund) function. Accordingly, they are not covered by the nonappropriated fund liability insurance program.¹³

B. STATUS

Military flying clubs are designated as Morale, Welfare, and Recreational (MWR) activities.¹⁴ They are established as membership associations, are comprised of voluntary members, and are generally self-supporting.¹⁵ They are also considered nonappropriated fund instrumentalities (NAFIs) of the Federal Government.¹⁶ As "in-

⁹ See, e.g., *id.* ¶ 1-2a(3) & (4).

¹⁰ See, e.g., *id.* ¶ 4-5h.

¹¹ See, e.g., *id.* ¶ 1-2c.

¹² See *id.* ¶ 1-2b.

¹³ *Id.*; see *infra* notes 40-43 and accompanying text.

¹⁴ See, e.g., OPNAVINST 1710.2E, ¶ 103 (May 24, 1993).

¹⁵ See, e.g., AFR 215-12, ¶ 1-3.

¹⁶ See, e.g., *Walls v. United States*, 832 F.2d 93, 94 n.2 (7th Cir. 1987); *Woodside v. United States*, 606 F.2d 134, 136 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *Brucker v. United States*, 338 F.2d 427, 428 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965); *United States v. Hainline*, 315 F.2d 153, 156 (10th Cir.), *cert. denied*, 375 U.S. 895 (1963); OPNAVINST 1710.2E, ¶ 103 (May 24, 1993). A NAFI is generally a self-supporting instrumentality, i.e., not funded by Congressional appropriation. *Woodside*, 606 F.2d at 136 n.1 (citing *United States v. Hopkins*, 427 U.S. 123, 125 n.2 (1976); *Johnson v. United States*, 600 F.2d 1218 (6th Cir. 1979)). Nevertheless, military flying clubs do receive some appropriated support. See, e.g., AFR 215-12, ¶ 1-3 (Sept. 5, 1988) (stating that Air Force Aero Clubs "receive appropriated fund support as allowed by AFR 215-5"); AR 215-2, ¶ 6-142 (Sept. 10, 1990) (stating that Army Flying Activities "are entitled to limited financial support as stated in AR 215-1, chapter 2 and appendix C, including

strumentalities" of the Federal Government, they may not be incorporated under Federal or State law. Club assets are assets of the U.S. Government.¹⁷

More importantly, military flying clubs share in the sovereign immunity of the United States.¹⁸ Accordingly, any suit based on the alleged negligence of a military flying club, or a flying club employee acting within the scope of his or her employment, must be brought against the United States under the terms and conditions of the Federal Tort Claims Act (FTCA).¹⁹

C. OPERATION

Military flying clubs are subject to "strict and pervasive control" by the DOD.²⁰ Each military department publishes its own regulations, instructions, and/or orders which set forth the basic policies and procedures governing the establishment, operation, and disestablishment of military flying clubs.²¹ In addition, each military flying club writes its own local Operating Instructions (OIs),²²

hanging and tying down of aircraft at installations where adequate facilities are available").

¹⁷ See, e.g., OPNAVINST 1710.2E, ¶ 103 (May 24, 1993).

¹⁸ *Mignona* [sic] v. *Sair Aviation*, No. 85-3675, slip op. at 3-4 (N.Y. Sup. Ct. Feb. 27, 1992); see also *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) (holding that post exchange, a NAFI, shared in the sovereign immunity of the United States); *Bramblett v. Desobry*, 490 F.2d 405, 406 (6th Cir. 1974) (holding that the Fort Knox Gun Club, a NAFI, shared in the sovereign immunity of the United States); Department of Defense Directive 1015.1 (Aug. 18, 1991) (defining a NAFI as an entity which "enjoys the legal status of an instrumentality of the United States"); AFR 176-28 (entitled "Nonappropriated Fund (NAF) Liability and Personnel Claims"), ¶ 2 (Aug. 27, 1990) (providing that "NAFIs are instrumentalities of the Federal government and enjoy its privileges and immunities").

¹⁹ 28 U.S.C. §§ 1346(b), 2671-2680 (1988); see *infra* notes 49-62 and accompanying text.

²⁰ *Walls*, 832 F.2d at 94 n.2.

²¹ See AFR 215-12 (Sept. 5, 1988) (entitled "Air Force Aero Club Program"); OPNAVINST 1710.2E (May 24, 1993) (entitled "Navy Flying Club Program"); AR 215-2, Ch. 6, Sec. 12 (Sept. 10, 1990) (entitled "Army Flying Activities"); Marine Corps Order [hereinafter MCO] P1710.16E (May 6, 1993) (entitled "Marine Corps Aero Club Program Manual").

²² See, e.g., AFR 215-12, ¶ 1-4c(2) (Sept. 5, 1988); OPNAVINST 1710.2E, ¶ 105a(4)(b) (May 24, 1993).

Constitution, and By-Laws.²³

Although all military flying clubs have the same general purpose,²⁴ there are many nuances among the publications of the four military services which could have legal significance. Review of the applicable material should be conducted to determine the policies and procedures of the particular flying club at issue, and the specific duties and responsibilities of club employees, contractors, and members.

Generally, each flying club has a club manager, who is responsible for day-to-day operations, a chief flight instructor, who supervises and monitors the activities of all club instructors,²⁵ and an advisory committee,²⁶ whose function is to assist the club manager in operating the club "in a safe, efficient and businesslike manner."²⁷ Voting members of the advisory committee include a president, operations officer, safety officer, and maintenance officer.²⁸

D. MEMBERSHIP AND INCOME

Membership in a military flying club is generally open to all active duty and retired military personnel and their families, disabled veterans, reserve component and National Guard members, military academy and ROTC ca-

²³ See, e.g., MCO P1710.16E, ¶ 1003.3 (May 6, 1993) & Appendix A.

²⁴ See *supra* notes 8-9 and accompanying text.

²⁵ See, e.g., AFR 215-12, ¶¶ 2-4 & 2-7 (Sept. 5, 1988). The chief flight instructor is also responsible for developing an Operating Instruction (OI) in the case of the Air Force, *id.* ¶ 2-7, and Standard Operating Procedures (SOPs) in the case of the Navy, OPNAVINST 1710.2E, ¶ 207 (May 24, 1993), to be used by all club instructors.

²⁶ Referred to as an Advisory Board by the Marine Corps, MCO P1710.16E, ¶ 2002 (May, 6, 1993), a Board of Directors (BOD) by the Navy, OPNAVINST 1710.2E, ¶ 204 (May 24, 1993), and an Advisory Committee (AC) by the Air Force, AFR 215-12, ¶ 2-5 (Sept. 5, 1988).

²⁷ See, e.g., OPNAVINST 1710.2E, ¶ 204c.

²⁸ See, e.g., AFR 215-12, ¶ 2-6 (Sept. 5, 1988). The establishment of an advisory committee for Army Flying Activities (AFAs) is optional, see AR 215-2, ¶ 6-142d (Sept. 10, 1990) (providing that on "AFA may establish ad hoc or advisory committees per AR 215-1, Ch. 9"); however, the appointment of a safety officer, operations officer, maintenance officer, club manager, and chief flight instructor is mandatory. See AR 215-2, ¶ 6-143 (Sept. 10, 1990).

dets, foreign military personnel and their families assigned to the sponsoring installation, active and retired DOD civilians and their families, and other personnel who support the DOD mission as authorized by the Installation Commander.²⁹

Income is derived from membership dues and assessments, participation fees and charges for aircraft usage, interest on investments, proceeds from property sales and authorized resale activities.³⁰ Aircraft are primarily acquired either by purchase or exclusive-use lease from private owners. They also may be acquired by loan of excess DOD or General Services Administration aircraft.³¹ Although operated like a business, flying clubs generally retain all income to finance club activities.³²

E. FLIGHT TRAINING/SAFETY

Military flying clubs provide ground school and flight instruction which prepare students to meet the performance standards contained in the applicable FAA Practical Test Standards.³³ Ground school and flight training programs are based on the curriculum in 14 C.F.R. Part 61, entitled "Certification: Pilots and Flight Instructors," and in 14 C.F.R. Part 141, entitled "Pilot Schools."³⁴ Military flying clubs may retain FAA certified flight instructors as employees or as independent contractors.³⁵

Military flying clubs also provide accident prevention programs, which usually include safety meetings, the construction and maintenance of safety bulletin boards, and the placement of safety related materials in the Pilot Information File (PIF),³⁶ which is a binder maintained by each flying club containing material of interest to all pi-

²⁹ See, e.g., AFR 215-12, ¶ 2-9 (Sept. 5, 1988).

³⁰ See, e.g., *id.* ¶ 1-3d.

³¹ See, e.g., *id.* ¶¶ 3-1, 3-3.

³² See, e.g., *id.* ¶ 1-3.

³³ See *supra* note 3 and accompanying text.

³⁴ See, e.g., AFR 215-12, ¶ 4-10 (Sept. 5, 1988).

³⁵ See, e.g., *id.* ¶ 2-8.

³⁶ See, e.g., *id.* ¶¶ 5-1 through 5-5.

lots, and which each pilot must read and initial.³⁷ In addition, flying clubs maintain individual training records which document pilot currency, training, attendance at safety meetings, review of flight publications maintained in the PIF, and test scores.³⁸

F. ACCIDENT INVESTIGATION

When a flying club aircraft is involved in an accident, as defined by 49 C.F.R. Part 830, the governing military department will conduct a "mishap investigation." The purpose of this investigation is to determine causes and identify steps to prevent future accidents. The military officer assigned to conduct the mishap investigation is expected to work in close coordination with National Transportation Safety Board (NTSB), Federal Aviation Administration (FAA), and/or International Civil Aviation Organization (ICAO) investigators.³⁹

G. INSURANCE

Each military service maintains its own insurance program to cover third-party liability and hull damage in the event of an accident or incident involving flying club activities. At the present time, significant differences exist between the Air Force's program and the cooperative programs of the Army, Navy, and Marine Corps.⁴⁰

1. *The Air Force*

The Air Force maintains a self-insurance fund and has a deductible in its commercial policies in the amount of \$1 million which the fund is designed to cover. Currently, there are two commercial insurance policies covering third-party liability exposure. The policies provide that the Air Force shall have a \$1 million self-insured retention

³⁷ See, e.g., *id.* ¶ 4-2a.

³⁸ See, e.g., *id.* ¶ 2-14.

³⁹ See, e.g., *id.* ¶ 5-8.

⁴⁰ Compare, e.g., AFR 215-12, ¶ 1-7 (Sept. 5, 1988) with OPNAVINST 1710.2E, Ch. 8 (May 24, 1993).

(SIR). Each policy then provides a \$10 million layer of coverage, for a total limit on liability of \$20 million.⁴¹ The SIR is an aggregate amount in any one contract year. Named insureds include the United States, the U.S. Air Force, the Aero Club, Aero Club employees, members, contract flight instructors and mechanics, as well as authorized patrons.

Aircraft hull insurance is provided for club-owned and leased aircraft under the commercial insurance program. The amount of hull insurance on leased aircraft is negotiated by the Air Force with each individual owner. There is no hull coverage for Government-owned aircraft used by the aero club, but NAF-purchased equipment installed on these aircraft is covered.

Although the Air Force purchases commercial liability insurance to cover settlements and judgments in excess of \$1 million, the Air Force reserves the right to adjudicate and defend all claims and litigation arising from aero club activities. Under the terms of the commercial insurance policy, the carrier must request permission from the Air Force to participate actively in the defense of any aero club litigation.

If a club member is sued in his or her individual capacity for a tort committed or allegedly committed while participating in an Aero Club activity, the Air Force may authorize employment of civilian counsel to defend his or her interests.⁴² If the claim alleges patron or contractor liability and the damages sought are in excess of \$25,000, the insurance carrier will normally be asked to resolve the claim. Investigation, representation, and defense costs are cumulative toward satisfying the SIR.

If the United States, the Air Force, the Aero Club, or a Government employee acting within the scope of his or

⁴¹ As of January 1, 1994, the first layer is provided by the United States Aircraft Insurance Group (USAIG) (not affiliated with the U.S. Government) of New York, New York, and the second layer by Summerset Aviation, Inc., of Dallas, Texas.

⁴² AFR 178-28, ¶ 13 (Aug. 27, 1990). Under this regulation, legal representation by private counsel may be provided to other individuals as well.

her duties is sued in tort litigation arising from Aero Club activities, defense is normally provided by the U.S. Department of Justice (DOJ). Any settlement or judgment arising from the alleged negligence of a *nonappropriated* fund employee (someone hired by the Aero Club and paid from nonappropriated funds) will be paid out of the self-insurance fund and by the excess insurance carrier. On the other hand, any settlement or judgment arising from the alleged negligence of an *appropriated* fund employee (an active duty military or federal civilian employee) will be paid by the U.S. Treasury.

2. *The Army, Navy, and Marine Corps*

The Army, Navy, and Marine Corps maintain "all risk" commercial hull and aviation liability insurance. Named insureds include the United States and all agencies thereof, all Army Flying Activities, Navy Flying Clubs, and Marine Corps Aero Clubs, including their individual members, employees, and independent contractors (certified flight instructors and aircraft mechanics). Presently, the Army, Navy, and Marine Corps are all insured under the same program, with individual policies written for each service.⁴³ Third-party liability coverage is limited to \$25 million with no deductible amount under the Navy policy, and is limited to \$10 million with no deductible amount under the Army and Marine Corps policies. Aircraft hull damage coverage includes a \$1,000 deductible per occurrence under the Navy and Marine Corps policies, and a \$500 deductible per occurrence under the Army policy.

All claims and litigation arising out of Army, Navy, and Marine Corps flying club activities are presently defended by the commercial insurance carrier, in consultation with the DOJ and military department involved in the litigation.

⁴³ As of November 1993, coverage for the Army, Navy, and Marine Corps is also provided by USAIG.

III. LITIGATION

A. TYPES OF CASES

Military flying club cases potentially involve complex factual and legal issues, and may be further complicated by allegations of negligence directed at other Government entities. For example, in *Bearden v. United States*,⁴⁴ Air Force Reservist Terry Hawkins, a private pilot, rented a single-engine aircraft from the Maxwell-Gunter AFB Aero Club in Montgomery, Alabama, for a recreational cross-country flight to Las Vegas, Nevada. Contrary to the flight plan which the Aero Club had approved, Hawkins embarked on a flight to Portland, Oregon. On the fifth day of the flight, the plane crashed in the Columbia River Gorge, near Hood River, Oregon, killing all six occupants. The estates of the pilot and passengers brought wrongful death actions against the United States. Allegations included negligent entrustment, supervision, maintenance and flight instruction by the Maxwell-Gunter AFB Aero Club; inaccurate, incomplete, and misleading weather briefings by the Redmond, Oregon, Flight Service Station (FSS); and negligent performance of air traffic control services by the Seattle, Washington, Air Route Traffic Control Center (ARTCC).

The insurance carrier, which later went bankrupt, denied insurance coverage for the pilot on the basis that his negligence was "gross and willful." The passenger plaintiffs attempted to impute the pilot's negligence to the United States on a "master-servant" theory.⁴⁵ Four of the five passengers had failed to execute a Covenant Not To Sue and Indemnity Agreement as required by Air Force regulations.⁴⁶ After extensive discovery and considerable motion practice, including a motion for sanctions in the form of a default judgment against the United States,⁴⁷

⁴⁴ 21 Av. Cas. (CCH) 17,533 (N.D. Ala. 1988). This author was lead counsel for the United States.

⁴⁵ See *infra* notes 91-92 and accompanying text.

⁴⁶ See *infra* notes 101-05 and accompanying text.

⁴⁷ In their motion for sanctions, plaintiffs alleged that the Government inten-

the case proceeded to trial. In a 90-page decision, the court completely exonerated the United States Government.⁴⁸

B. SPECIAL CONSIDERATIONS

The following unique issues should be considered in handling military flying club cases:

1. The FTCA

As discussed previously,⁴⁹ military flying clubs are "nonappropriated fund instrumentalities" of the United States. Therefore, the only valid jurisdictional basis for a claim arising out of the alleged wrongful act or omission of an employee of a military flying club acting within the scope of his or her employment is the Federal Tort Claims Act (FTCA).⁵⁰ Under the FTCA, the only federal entity that can be sued is the United States.⁵¹ Accordingly, a

tionally destroyed the aircraft's altimeter, negatives and photographs of the crash site, and one of several tape recordings containing conversations between air traffic controllers and the pilot. The motion was denied on several grounds, including a lack of evidence of bad faith or willfulness on the part of the Federal Government. See *Bearden*, 21 Av. Cas. at 17,535-37.

⁴⁸ *Bearden*, at 17,533 (N.D. Ala. 1988). Specifically, the district court found that the Maxwell-Gunter Aero Club was not negligent in: 1) entrusting the Club aircraft to Hawkins, *id.* at 17,543; 2) failing to locate and ground Hawkins en route, *id.* at 17,544; 3) providing Hawkins with a plane equipped with an allegedly defective altimeter, *id.* at 17,544-46; 4) failing to participate more fully in the flight, *id.* at 17,543-44; 5) clearing the flight, *id.*; and 6) providing flight instruction to Hawkins, *see id.* at 17,543. The district court also found that the Redmond FSS did not provide Hawkins with incomplete, inaccurate, and misleading weather information. *Id.* at 17,546-48. Further, the court found that the Seattle ARTCC did not fail to: 1) issue a "safety advisory;" 2) solicit and relay pilot reports; and 3) provide other allegedly pertinent air traffic control services to Hawkins. *Id.* at 17,548-56. The court held that the sole cause of the crash was Hawkins' deliberately flying into instrument meteorological conditions (IMC) without an instrument rating. *Id.* at 17,565-66. The court concluded that it could not find "that the defendant was negligent or that the conduct of Hawkins was reasonably foreseeable by any agent of the defendant, or that any such agent violated a duty owed to any plaintiff, or that any such agent's conduct was a substantial contributing factor in the accident." *Id.* at 17,565 n.52.

⁴⁹ See *supra* notes 16 and 18 and accompanying text.

⁵⁰ 28 U.S.C. §§ 1346(b), 2671-2680 (1988).

⁵¹ See 28 U.S.C. §§ 2671 (definitions), 2679 (exclusiveness of remedy) (1988). Suits against individual employees in their individual capacities will likely be ap-

military flying club cannot be sued *eo nomine* either in federal or state court.

The case of *Mignona [sic] v. Sair Aviation*⁵² is instructive. *Mignona* arose from the crash of a Mooney aircraft rented from the Hancock Field Aero Club in New York. The pilot, an FAA air traffic controller, brought suit in state court against the Club for injuries he allegedly sustained in the crash. After removal to district court, the case against the United States was dismissed based on plaintiff's failure to file an administrative claim.⁵³ On appeal, the Second Circuit ruled *sua sponte* that removal was improper and remanded the case to state court.⁵⁴ On remand, the state court found that the Hancock Field Aero Club shared in the sovereign immunity of the United States, through its status as a nonappropriated fund instrumentality.⁵⁵ The court also found that the only possible waiver of sovereign immunity, the FTCA, explicitly denies jurisdiction to state courts.⁵⁶ Accordingly, the case was dismissed for lack of subject matter jurisdiction.⁵⁷

Whether suing or defending the United States in tort litigation arising from military flying club activities, consideration should be given to all of the limitations and exceptions of the FTCA. For example, in *Jay v. U.S. Department of the Navy*,⁵⁸ an aircraft belonging to the Atsugi Navy Flying Club crashed at the U.S. Naval Air Facility,

appropriate for removal to Federal court and substitution of the United States under 28 U.S.C. § 2679(d)(2), the *Westfall* statute. The procedures for representation of Federal officials and employees by the Department of Justice or by private counsel furnished by the Department in civil proceedings in which Federal employees are sued in their individual capacities are set forth in 28 C.F.R. § 50.15 (1993).

⁵² No. 85-3675 (N.Y. Sup. Ct. Feb. 27, 1992).

⁵³ See *Mignona [sic] v. Sair Aviation*, No. 85-CV-1158, slip. op. at 11 (N.D.N.Y. Mar. 5, 1986).

⁵⁴ See *Mignogna v. Sair Aviation*, 937 F.2d 37, 40-41 (2d Cir. 1992) (holding that the state court action against the Aero Club was not subject to removal pursuant to 28 U.S.C. § 1442(a)(1) (1988) as an action against an "officer" of the United States or of a federal agency).

⁵⁵ *Mignona [sic]*, No. 85-3675, slip op. at 4.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ No. 4-89-136-K (N.D. Tex. June 5, 1989).

Atsugi, Japan. There were two fatalities: Major Albert J. Calhoun, Jr., an active duty member of the United States Army on temporary duty in Japan; and Mr. Yasumasa Ogo, a Japanese national employed as an instructor at the club. At the time of the accident, Major Calhoun was on board the aircraft as a student.

Nickie Jay, as executrix of the estate of Major Calhoun, brought a wrongful death action in Federal Court against the U.S. Navy, the Atsugi Navy Flying Club, and Mr. Ogo's estate. No action was brought against the United States, and no administrative claim was filed within the two-year statutory period under the FTCA. Accordingly, the U.S. Navy, the Atsugi Navy Flying Club, and the estate of Mr. Ogo moved for dismissal or alternatively for summary judgment. The following grounds were asserted:

- 1) that jurisdiction could only lie pursuant to the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680;
- 2) that pursuant to 28 U.S.C. § 2679, the only proper defendant would be the United States;
- 3) that the suit was barred by 28 U.S.C. § 2680(k), as a claim which arose in a foreign country;
- 4) that plaintiff failed to file an administrative claim and therefore the court lacked jurisdiction pursuant to 28 U.S.C. 2675(a);
- 5) that the suit was barred by the *Feres* doctrine, *see Feres v. United States*, 340 U.S. 135 (1950), because the death of Major Calhoun occurred "incident to service" in the military;⁵⁹ and
- 6) that the Atsugi Navy Flying Club was a nonappropriated fund instrumentality of the United States; that review of Mr. Ogo's employment contract indicated that he was an employee of the Club and not an independent contractor; that Mr. Ogo was clearly acting within the scope of his employment at the time of the accident; and that under the circumstances, Public

⁵⁹ Defendant's Motion to Dismiss or Alternatively for Summary Judgment at 1-2, Jay v. U.S. Department of the Navy, No. 4-89-136-K (N.D. Tex. June 5, 1989).

Law 100-649, amending 28 U.S.C. § 2679, created an exclusive remedy against the United States, notwithstanding that such suit would be subject to dismissal.⁶⁰

The United States also asked the court to deny plaintiff's demand for punitive damages, prejudgment interest, and a jury trial, on the ground that these were expressly precluded under the FTCA, 28 U.S.C. §§ 2674 and 2402 (1988).⁶¹ After reviewing the pleadings and supporting affidavit, the district court dismissed the action against the U.S. Department of the Navy and the Atsugi Navy Flying Club and entered judgment in favor of the estate of Yasumasa Ogo.⁶²

2. *The Feres Doctrine*

Tort actions commenced under the provisions of the FTCA by a plaintiff who was on active duty in an armed service at the time of the injury have long been controlled by the U.S. Supreme Court decision in *Feres v. United States*.⁶³ In that case, the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."⁶⁴ The Court explained: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he

⁶⁰ Defendant's Brief in Support of Motion to Dismiss or Alternatively for Summary Judgment at 3, *Jay v. U.S. Department of the Navy*, No. 4-89-136-K (N.D. Tex. June 5, 1989).

⁶¹ Defendant's Motion to Dismiss or Alternatively for Summary Judgment at 2, *Jay v. U.S. Department of the Navy*, No. 4-89-136-K (N.D. Tex. June 5, 1989).

⁶² See *Jay*, No. 4-89-136-K, slip op. at 2. The district court stated that plaintiff had agreed that she had no valid claim against the United States, the U.S. Navy, or the Atsugi Navy Flying Club. Relying on the Government's affidavit concerning Mr. Ogo's status, the court held that Mr. Ogo was an employee of the Club at all relevant times. Therefore, he could not be sued in his individual capacity. *Id.* at 1-2.

⁶³ 340 U.S. 135 (1950).

⁶⁴ *Id.* at 146.

is serving."⁶⁵ This rule, known as the *Feres* doctrine, was reaffirmed by the U.S. Supreme Court in the case of *Stencel Aero Engineering Corp. v. United States*,⁶⁶ which held that the United States could not be sued for indemnification for damages paid by a third-party to a plaintiff who was a serviceman injured incident to service.⁶⁷

Injuries to military members involved in flying club activities have been held to be "incident to service."⁶⁸ In *Walls v. United States*⁶⁹ an active-duty service member of the U.S. Army brought suit for injuries received as a passenger in the crash of a Cessna 172 on lease to the Peterson AFB Aero Club in Colorado. The Seventh Circuit held that plaintiff's suit was barred by *Feres*, emphasizing that plaintiff was subject to military discipline while on board the Aero Club aircraft (though off duty and on an "out-of-bounds pass" at the time of the crash).⁷⁰ The court of appeals also stressed that plaintiff was taking advantage of privileges restricted to the military.⁷¹

The Sixth Circuit reached a similar conclusion in *Woodside v. United States*.⁷² In that case, the court of appeals held that a serviceman who was killed in a Hickman-Wheeler AFB Aero Club airplane while on leave and receiving recreational flight instruction toward a commercial pilot certificate was engaged in "activity incident to service."⁷³ In holding that the case was barred by *Feres*, the Sixth Circuit emphasized that membership in an aero club is restricted to military or military related personnel; that an aero club is a nonappropriated fund activity of the

⁶⁵ *Id.* at 141.

⁶⁶ 431 U.S. 666 (1977).

⁶⁷ *Id.* at 673-74.

⁶⁸ See *Walls v. United States*, 832 F.2d 93 (7th Cir. 1987); *Woodside v. United States*, 606 F.2d 134 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *Eckles v. United States*, 471 F. Supp. 108 (M.D. Pa. 1979).

⁶⁹ 832 F.2d 93 (7th Cir.), *aff'g*, 651 F. Supp. 1049 (S.D. Ind. 1987). This author defended the United States in the district court.

⁷⁰ *Id.* at 96.

⁷¹ *Id.*

⁷² 606 F.2d 134 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

⁷³ *Id.* at 142.

Air Force established to promote the morale of service members; and that aero club activities are governed by Air Force regulations.⁷⁴ The Sixth Circuit also stressed that aero clubs are subject to the supervision of the base commander and are indirectly supported by the Air Force through the use of Air Force facilities.⁷⁵

Likewise, in *Eckles v. United States*,⁷⁶ Army Lt. Colonel Eckles rented a Cessna 150 from the Carlisle Barracks Army Aero Club for one last practice flight before taking his private pilot checkride scheduled for the next day. While apparently practicing stalls, and Lt. Col. Eckles was killed. Suit was brought by his widow against the United States alleging negligent flight instruction and supervision on the part of Aero Club employees. The district court found that Lt. Col. Eckles could not have been an aero club member unless a member of the armed forces, and that a suit by a serviceman resulting from aero club activities could lead to serious adverse effects regarding military discipline.⁷⁷ Concluding that Eckles' death arose out of an activity incident to his military service,⁷⁸ Chief Judge William J. Nelson held that the suit was barred by *Feres*.⁷⁹

Participation in other types of DOD recreational activities also has been found to be "incident to service."⁸⁰ These cases reiterate that "incident to service" is not a narrow term restricted to military training, field maneu-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 471 F. Supp. 108 (M.D. Pa. 1979).

⁷⁷ *Id.* at 111.

⁷⁸ *Id.*

⁷⁹ *Id.* at 110.

⁸⁰ See, e.g., *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975) (riding a horse rented from military riding stable); *Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966) (swimming in an on-base swimming pool); *Mariano v. United States*, 444 F. Supp. 316 (E.D. Va. 1977) (at off duty job at recreation club owned by Navy), *aff'd*, 605 F.2d 721 (4th Cir. 1979); *Keisel v. Buckeye Donkey Ball, Inc.*, 311 F. Supp. 370 (E.D. Va. 1970) (riding a donkey during a ball game sponsored by Special Services division of a Naval base); *Richardson v. United States*, 226 F. Supp. 49 (E.D. Va. 1964) (trying to escort enlisted man, without specific request, from Non-commissioned Officers' Club).

vers, or combat situations; rather, it is a broad concept encompassing all types of recreational activities, even though the military member is not acting pursuant to orders or subject to direct military command or discipline.⁸¹

3. Imputed Negligence

Brucker v. United States,⁸² *United States v. Hainline*,⁸³ *Bearden v. United States*⁸⁴ and *Visbeck v. United States*,⁸⁵ address the issue of whether a flying club member who is using a flying club airplane for a recreational flight is an employee of the United States under the FTCA.

In *Brucker* the plaintiff sued the United States for injuries sustained in the crash of an aircraft owned by the Castle AFB Aero Club in California. Plaintiff, a member of the Club, had hired another Club member, Lt. Hammack, whom the Club listed as a "check pilot," to give him a check flight in preparation for a supervised solo. The lower court found that the crash resulted from Lt. Hammack's negligence, but that "Lt. Hammack was not acting as an agent of the Club and hence not an agent of the Government at the time of the flight in question." The Ninth Circuit affirmed, emphasizing that the Club had no contractual arrangements with Lt. Hammack, did not compensate him, and neither possessed nor exercised control over his conduct.⁸⁶ Accordingly, the appellate court held that Lt. Hammack's negligence could not be imputed to the United States.⁸⁷

The United States obtained a similar result in *Hainline*. The plaintiff sued the United States for injuries she received when a McConnell AFB Aero Club airplane flown by an off-duty Air Force officer struck her car. The Tenth Circuit held that, because the Air Force officer was off

⁸¹ See *Woodside*, 606 F.2d at 141.

⁸² 338 F.2d 427 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965).

⁸³ 315 F.2d 153 (10th Cir.), *cert. denied*, 375 U.S. 895 (1963).

⁸⁴ No. CV 85-PT-1995-S (N.D. Ala. Dec. 3, 1985).

⁸⁵ Civ. No. ED-84-CA-136 (W.D. Tex. Oct. 9, 1984).

⁸⁶ *Brucker*, 338 F.2d at 429.

⁸⁷ *Id.*

duty and flying the plane as a member of the Aero Club, he was not an employee of the Club nor was he acting within the scope of his employment with the military at the time of the crash.⁸⁸ The circuit court also noted that an Air Force regulation, which purported to treat members as employees for the purposes of administering benefits or for accident investigation, did not make them employees in determining the substantive liability of the United States under the FTCA.⁸⁹ The status of such members is a separate factual finding governed by federal law.⁹⁰

In *Bearden* the district court granted partial summary judgment in favor of the United States, finding that an off-duty U.S. Air Force Reserve officer who was piloting an aero club airplane for recreational purposes was not acting within the scope of his military duties.⁹¹ Therefore, the court would not impute his negligence to the United States.⁹²

In support of its Motion for Partial Summary Judgment, the United States filed three affidavits stating that the pilot was a member of the Maxwell-Gunter AFB Aero Club, that he was not an employee of the Club, that he used the plane for his own recreational purposes, and that he had sole discretion over planning and executing the flight. The affiants were the President of the Club, the Manager of the Club, and the Commander of the Squadron to which the pilot was assigned.

Finally, in *Visbeck*, a member of the U.S. Air Force rented a Cessna 172 from the Goodfellow AFB Aero Club in Texas for a recreational flight. The aircraft crashed near El Paso, Texas. Plaintiff, a civilian and the only survivor on board the aircraft, sued the United States for personal injuries, alleging pilot negligence. The United

⁸⁸ *Hainline*, 315 F.2d at 156.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Bearden*, No. CV 85-PT-1995-S, slip op. at 3; see also *supra* notes 44-48 and accompanying text.

⁹² *Id.*

States moved for summary judgment, asserting that the pilot of the aircraft was not acting within the scope of his office or employment with the Air Force at the time of the crash. In support of its Motion, the United States submitted affidavits which established that the pilot was not an employee of the Aero Club and was not acting "in the line of duty" at the time of the crash. In light of the uncontroverted evidence and the law set forth in *Hainline*, the district court entered summary judgment in favor of the United States.⁹³

In several flying club cases, plaintiffs have attempted to equate "incident to service" with "scope of employment" in order to impute the negligence of a serviceman to the United States.⁹⁴ However, "incident to service" is defined more broadly than "scope of employment."⁹⁵ As Chief Judge William J. Nelson stated in *Eckles*: "It is not inconsistent that a serviceman be engaged in an activity incident to service according to federal law, such that *Feres* applies, barring the action, and at the same time not be acting within the scope of employment under applicable state law."⁹⁶ The two tests involve different situations and different concerns.⁹⁷

4. Absolute Liability

Some jurisdictions impose liability by statute on the owner of an airplane for the pilot's negligence even though there was no negligence on the part of the owner.⁹⁸ Such statutes, however, are not applicable in

⁹³ *Visbeck*, No. 12D-84-CA-136, slip op. at 3.

⁹⁴ See, e.g., Plaintiff's Brief in Opposition at 15, *Walls v. United States*, 651 F. Supp. 1049 (S.D. Ind.), *aff'd*, 832 F.2d 93 (7th Cir. 1987).

⁹⁵ See *Eckles v. United States*, 471 F. Supp. 108, 111 (M.D. Pa. 1979).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., *Sanz v. Renton Aviation, Inc.*, 511 F.2d 1027, 1029 (9th Cir. 1975); *Hays v. Morgan*, 221 F.2d 481, 482 (5th Cir. 1955); *Broadway v. Webb*, 462 F. Supp. 429, 431 (W.D.N.C. 1977); *Rosdail v. Western Aviation, Inc.*, 297 F. Supp. 681, 685 (D. Col. 1969); 8 Am. Jur. 2d *Aviation*, §§ 92-93 (1980); Joseph E. Edwards, *Vicarious Liability for Pilot's Negligence*, 11 A.L.R. Fed. 901 (1972); K. J. Rob-

FTCA cases involving Government-owned aircraft.⁹⁹

5. *Covenant Not To Sue and Indemnity Agreement*

Any person who is not an active duty member of the U.S. Armed Forces may not operate or ride in a military flying club aircraft until he or she has executed a "Covenant Not To Sue and Indemnity Agreement." A new covenant must be signed annually. A parent or legal guardian is required to execute the document on a minor's behalf.¹⁰⁰ The cases of *Hardin v. United States*¹⁰¹ and *Kissick v. Schmierer*¹⁰² address the validity of these agreements.

Hardin arose out of the crash of an airplane owned by Maxwell-Gunter AFB Aero Club. Suit was brought against the United States by the estate of the decedent, a passenger in the accident aircraft, alleging negligence on the part of the Aero Club as well as other Government entities.¹⁰³ Prior to the fatal flight, the decedent, who was also the wife of the pilot, had signed an Air Force Form 1585, Covenant Not To Sue and Indemnity Agreement, which stated:

In consideration of the Aero Club permitting me to participate in these activities, I, for myself, my heirs, administrators, executors, and assignees, hereby covenant and agree that I will never institute, prosecute, or in any way demand, claim, or file suit against the U.S. Government and/or its officers, agents, or employees, acting officially

erts, *Tort Liability of One Renting or Loaning Airplane to Another*, 4 A.L.R. 2d 1306, 1306-09 (1949).

⁹⁹ See *Laird v. Nelms*, 406 U.S. 797, 799-800 (1972) (FTCA precludes action against the United States based upon strict or absolute liability); *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447, 470 (E.D.N.Y. 1971) (mere ownership of dangerous property does not make the United States liable under the FTCA, "since such liability would be tantamount to imposition of absolute liability without regard to negligence").

¹⁰⁰ See, e.g., AFR 215-12, ¶ 2-15 (Sept. 5, 1988).

¹⁰¹ No. CV 85-PT-2941-S (N.D. Ala. Apr. 23, 1986) (arising from the same crash at issue in *Bearden v. United States*, 21 Av. Cas. (CCH) 17,533 (N.D. Ala. 1988)).

¹⁰² 816 P.2d 188, 190-91 (Alaska 1991).

¹⁰³ See *supra* notes 44-48 and accompanying text.

or otherwise, for any loss, damage, or injury to my person or my property which may occur from any cause whatsoever as a result of my participation in the activities of the Aero Club. . . .

I understand and agree that I am assuming the risk of any personal injury or property damage that may result while participating in Aero Club activities, including such injuries or damage as may be caused by the negligence of the U.S. Government.¹⁰⁴

Applying Alabama law, the court held that the Covenant had released the United States from any Aero Club negligence, but refused to hold, as a matter of law, that the Covenant had released the United States from the negligence, if any, of other agencies, such as the FAA.¹⁰⁵

In *Kissick* the widows of three deceased passengers brought wrongful death suits in state court against the estate of a pilot, an Air Force Major, involved in the crash of an Aero Club aircraft. The aircraft, owned by the Elmen-dorf AFB Aero Club in Anchorage, Alaska, had crashed into a mountain bordering Burns Glacier during a fishing trip. The court held that a Covenant Not To Sue and Indemnity Agreement signed by the three deceased civilian passengers pursuant to Government regulations did not bar claims against the estate of the pilot.¹⁰⁶ Under the Covenant Not To Sue, the passengers agreed not to bring a claim against the U.S. Government and/or its officers, agents, or employees, or club members, for any loss, damage, or injury to their persons or property. Applying Alaska law, the court found that the Covenant was ambiguous because the word "death" was missing.¹⁰⁷ The court, therefore, refused to uphold the validity of the Covenant.¹⁰⁸

¹⁰⁴ *Hardin*, No. CV 85-PT-2941-S, slip op. at 1.

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *Kissick*, 819 P.2d at 191-92.

¹⁰⁷ *Id.* at 190.

¹⁰⁸ *Id.* at 191-92.

6. *The FECA*

The Federal Employees' Compensation Act (FECA)¹⁰⁹ requires the United States to "pay compensation . . . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. . . ." ¹¹⁰ In general, FECA benefits are "exclusive and instead of all other liability to the United States or the instrumentality of the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States. . . ." ¹¹¹ Therefore, the FECA may provide a defense in certain military flying club cases.¹¹²

7. *Standard of Care*

a. Guest Statutes

Military regulations permit individuals to be carried on flying club aircraft as guests if they are personally and specifically invited by the pilot.¹¹³ In military flying club cases involving passengers, counsel should research state law to determine whether a "guest statute" may be applicable. Such statutes typically relieve the owner of an aircraft of liability for injury to a guest unless the owner or operator was grossly negligent.¹¹⁴

b. Military Regulations

In addition to FARs, flying club members must comply

¹⁰⁹ 5 U.S.C. §§ 8101-8193 (1988).

¹¹⁰ *Id.* § 8102(a).

¹¹¹ *Id.* § 8116(c). In addition, the FECA may bar third-party claims against the United States for contribution and indemnity when the underlying plaintiff is eligible for FECA benefits. *See, e.g., Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 197-98 (1983). The FECA may also apply to certain non-federal employees killed or injured while assisting the Federal Government in, for example, search and rescue missions. *See, e.g., 5 U.S.C. § 8141* (1988) (concerning volunteers).

¹¹² For example, the FECA may apply to a federal civilian employee who is performing a maintenance check or flight examination, or participating in a search and rescue mission, or traveling on TDY in a flying club aircraft.

¹¹³ *See, e.g., AFR 215-12, ¶ 4-5k* (Sept. 5, 1988).

¹¹⁴ *See, e.g., Or. Rev. Stat. § 30.115* (1989).

with military regulations and requirements in operating club aircraft.¹¹⁵ Military regulations and requirements are sometimes more restrictive than FAA regulations.¹¹⁶ Air Force regulations, for example, require at least an hour fuel reserve on VFR flights; the FARs require only 30 minutes. Air Force regulations require three miles visibility for day VFR flight; the FARs are less restrictive with regard to certain classifications of airspace. Air Force Aero Club pilots must adhere to certain crew duty-day limitations; must file flight plans for VFR cross-country flights; and may not fly at night outside the local area if non-instrument rated. No such restrictions exist under the FARs.¹¹⁷

It is well established that the FARs prescribe only "minimum standards of safety for aircraft personnel."¹¹⁸ Because military regulations and requirements frequently prescribe higher standards than the FARs, this could have an impact on the applicable standard of care.

*Bearden v. United States*¹¹⁹ addressed this issue in the context of a negligent entrustment claim. In that case, Air Force Reservist Terry Hawkins, a private pilot, rented a Piper Arrow owned by the Maxwell-Gunter Aero Club (MGAC) for a recreational cross-country flight.¹²⁰ Although Hawkins was not current in terms of takeoffs and landings under Air Force regulations,¹²¹ the MGAC Clearing Authority inadvertently cleared the flight. In addition, the MGAC Clearing Authority did not ensure that

¹¹⁵ See, e.g., AFR 215-12, Ch. 4 (Sept. 5, 1988).

¹¹⁶ *Bearden v. United States*, 21 Av. Cas. (CCH) 17,533, 17,544 (N.D. Ala. 1988).

¹¹⁷ Compare AFR 215-12, ¶ 4-5 (Sept. 5, 1988) with 14 C.F.R. Part 91 (1993).

¹¹⁸ See, e.g., *In Re Aircrash Disaster at John F. Kennedy Int'l Airport*, 635 F.2d 67, 75 (2d Cir. 1980).

¹¹⁹ 21 Av. Cas. (CCH) 17,533 (N.D. Ala. 1988).

¹²⁰ See *supra* notes 44-48 and accompanying text.

¹²¹ Hawkins was not current in takeoffs and landings in the accident airplane under AFR 215-12, ¶ 4-20(b), which required three takeoffs/landings in the same make and model aircraft within the preceding 60 days. Hawkins only had two. Hawkins, however, was current in takeoffs and landings under FAA Regulations, specifically 14 C.F.R. § 61.57, which required three takeoffs/landings within the preceding 90 days (Hawkins had 10). *Bearden*, 21 Av. Cas. at 17,538-39.

Hawkins had conducted the planning set forth in the Club's locally-generated "Checklist for Clearing Authority."

In rejecting plaintiffs' allegation of negligent entrustment, the court stated: "While MGAC makes an attempt to hold its members to perhaps higher than FAA standards, it does not become an insurer, assume the responsibilities placed on the pilot, nor become his guardian."¹²² The court stressed that "Hawkins was responsible for his own clearing at each airport from which he took off [during the cross-country];" and that "[t]he checklist is, in effect, a series of reminders, all of which a licensed qualified pilot can reasonably be expected to know."¹²³ The court also emphasized that "Hawkins would have been qualified to rent a similar plane from any non-governmental plane rental entity and fly strictly under FAA regulations."¹²⁴

IV. CONCLUSION

As "nonappropriated fund activities," military flying clubs are instrumentalities of the United States. For that reason, employees of military flying clubs are considered employees of the Federal Government for the purposes of the FTCA. Therefore, consideration must be given to the application of the FTCA in military flying club cases.

Effective management of military flying club litigation is dependent upon an initial determination of the status of the plaintiff(s) and alleged tortfeasor(s). This determination has the following implications: 1) if the alleged tortfeasor was a Government employee acting within the scope of his or her employment, any suit arising from his or her negligence, if any, must be brought against the United States under the FTCA; 2) if the alleged tortfeasor was acting outside the scope of his or her employment with the Federal Government, his or her negligence, if any, cannot be imputed to the United States; 3) if the al-

¹²² *Bearden*, 21 Av. Cas. at 17,544.

¹²³ *Id.*

¹²⁴ *Id.* at 17,544 n.13.

leged tortfeasor was not acting as an agent of the Federal Government (e.g. contract flight instructor or mechanic), his or her negligence, if any, cannot be imputed to the United States; 4) if the plaintiff (e.g. pilot or passenger) was acting "incident to service," his or her action against the United States is barred by *Feres*; 5) if the plaintiff is eligible for FECA benefits, he or she may not maintain an action in tort against the Federal Government; 6) if the plaintiff executed a Covenant Not to Sue and Indemnity Agreement, his or her suit, not only against the United States, but against any other party named in the Covenant, may be subject to dismissal; and 7) if the plaintiff was a "guest passenger," he or she may be faced with a heavier burden of proof in establishing flying club liability.

Military flying club cases frequently present challenging factual and legal issues. Each case should be analyzed on an individual basis with consideration given to the issues and guidelines set forth in this article.